United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7442
76-7451

ORIGINAL

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

OSCAR ROBERTSON, *et al.*,
Plaintiffs-Appellees,

WILTON N. CHAMBERLAIN, CLIFFORD RAY and CHESTER WALKER,
Objectors-Appellants,

—against—

NATIONAL BASKETBALL ASSOCIATION, *et al.*,
Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of New York (70 Civ. 1526)

AMICI CURIAE BRIEF OF AMERICAN BASKETBALL ASSOCIATION PLAYERS ASSOCIATION, AMERICAN BASKETBALL ASSOCIATION LONG ISLAND SPORTS, DENVER NUGGETS, INC., SAN ANTONIO BASKETBALL, LTD. and ARENA SPORTS, INC.

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Preliminary Statement

This joint brief is submitted on behalf of the American Basketball Association ("ABA"), four of its former members, Long Island Sports, Denver Nuggets, Inc., San Antonio Basketball, Ltd., Arena Sports, Inc.* (the "ABA expansion teams") and the American Basketball Association Players Association ("ABAPA"), as amici curiae, in support of the class action settlement in this case. This brief is filed pursuant to a written stipulation of counsel for all appellants and appellees.

Interest of the Amici Curiae

The ABA, a Delaware not-for-profit corporation, operated a professional basketball league, which competed with the National Basketball Association ("NBA"), from 1967 through 1976. When the instant action was commenced in 1970, plaintiffs-appellees (the NBA players) named the ABA as a defendant, along with the NBA and its member teams, and obtained a preliminary injunction against any merger or consolidation between the NBA and the ABA, or any of their member teams. So long as the NBA rules and regulations challenged in the complaint remained unchanged, the NBA

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* These were the names of these former ABA members when they were in the ABA. Their current names are Long Island Sports, Denver Nuggets, Inc., San Antonio Spurs Professional Basketball Club, Ltd. and Indiana Pacers, L.P.

players steadfastly opposed any such merger or consolidation and the injunction remained in effect.

Throughout the ABA's nine year history, its teams suffered almost continuous financial difficulties. Stability of ownership was a rarity, as teams constantly changed hands and many franchises had to be disbanded. During the 1975-76 season alone, four of the then ten ABA teams went out of business and others suffered substantial operating losses. It became apparent that the ABA could not continue to operate during the 1976-77 season and that the only salvation for the ABA and its remaining teams was to effect some accommodation with the NBA.

Shortly after the application of certain ABA teams to join the NBA, a separate class action lawsuit was filed in late 1975 by the ABAPA on behalf of all ABA players, against two of the four ABA expansion teams and the NBA, alleging antitrust violations by the NBA and challenging any accommodation between the NBA and the ABA without protection of the interests of the ABA players. Thus, it was clear that any accommodation between the NBA and the remaining ABA teams could not be achieved without the support of the ABAPA; nor could it be achieved as long as the injunction in this case was in effect.

In April, 1976, the NBA players and the NBA entered into an agreement settling this litigation which was approved by the Court below after a hearing in June, 1976. As a result of this settlement, with its radical modifications of all rules applicable to NBA players, it was possible to commence settlement discussions in the litigation commenced by the ABA players.

Faced with the certain demise of the ABA, it became obvious to representatives of the ABA and the ABAPA that, unless the remaining ABA teams were permitted to reach an accommodation with the NBA, there would be no assurance of jobs for ABA players and there would be virtually no possibility that already earned deferred compensation, pension benefits, or other employment benefits owed to, or to become due to, ABA players would be paid. Accordingly, the ABA and the ABAPA negotiated a settlement agreement designed to save the jobs of as many ABA players as possible, to guarantee the payment of obligations owed to such players and to provide for an orderly transition necessitated by the demise of the ABA.

The four ABA expansion teams signed agreements with the NBA in July, 1976 providing for their admission

into the NBA. Thus, as a direct result of the settlement agreement approved below, the injunction against merger or consolidation was dissolved (JA 1429),* the four ABA expansion teams were admitted to the NBA as part of an expansion of the NBA, and all claims among the ABA, the ABAPA and the NBA were resolved. In addition, the players on the four ABA expansion teams and those players selected in a special dispersal draft of ABA players became NBA players and their ABA contracts became NBA contracts. Absent the settlement in this action, the injunction would have remained in effect, a settlement among the ABA, APAPA and NBA would have been impossible and the ABA would have ceased operation.

The Robertson settlement, thus was, a sine qua non to saving the jobs of scores of former ABA players and guaranteeing to them the other benefits set forth in the ABAPA settlement agreement.

The interest of the ABA, the four ABA expansion teams and the ABA players in this settlement, is, therefore, manifest. Former ABA players wish to protect the jobs preserved by the absorption of the four old ABA

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* All references to the Joint Appendix are designated "JA".

franchises, as well as the benefits which have been guaranteed by the absorbed ABA teams to former ABA players who were not part of the expansion, and the four absorbed ABA franchises themselves wish to protect their substantial monetary investments. All have an interest in living peaceably under the restructured player allocation system of the NBA of which they are all now a part. All have an interest in the continued viability of the NBA.

Thus, the ABA, the four ABA expansion teams and the ABAPA join in this appeal to urge affirmance of the order of Judge Robert L. Carter approving the class settlement herein. That settlement unquestionably is in the best interests of all former and present NBA and ABA players and teams and is in the best interest of professional basketball.

ARGUMENT

THE SETTLEMENT WHICH ELIMINATED OR MODIFIED THE CHALLENGED PLAYER PRACTICES IS NOT ONLY FAIR AND REASONABLE BUT ALSO WAS DIRECTLY RESPONSIBLE FOR MAKING STABILITY POSSIBLE IN ALL OF PROFESSIONAL BASKETBALL.

Judge Carter properly approved this settlement,

which totally restructures the NBA's player allocation system. As Judge Carter found:

> "The settlement effectuates a radical modification of the disputed practices in respect of the college draft and options for future services. In addition, there will be a phasing out of the reserve compensation rules, arbitration of disputes, a covenant by the class not to sue, appointment of a Special Master to supervise and enforce the settlement agreement and retention of jurisdiction by the court to assert final authority in the enforcement of the settlement terms." (JA 1680)

The ABA, the ABA expansion teams and the ABAPA believe that such negotiated structural relief (in addition to the large money damage fund provided in the settlement to the Robertson class members) is more than fair and adequate, for it will greatly benefit and protect all NBA players, including those former ABA players now playing in the NBA. Option clauses, including those present in ABA player contracts which are now in force in the NBA, have been virtually eliminated, thereby enhancing players' freedom of movement and negotiation. The right of first refusal, which will soon replace the compensation rule, guarantees

that all players, including former ABA players, can negotiate with every team in the NBA and sign the best contract available. In addition, college players seeking professional careers are provided greater negotiating freedom and contractual guarantees by the settlement than have ever before existed in any sport. All of these beneits are protected by the settlement's terms precluding reimposition of the challenged restraints and providing expedited judicial review of any alleged violations. Judge Carter found that:

> "These terms come to grips with plaintiffs' objections enumerated in the lawsuit, while at the same time seeking to accommodate defendants' contentions that some restrictions or restraints are essential for the survival of the NBA as a viable organization able to field teams that offer truly competitive sports exhibitions." (JA 1680-81) (Emphasis supplied)

These terms come to grips with the objections of the ABA players as well, while maintaining a system within which the NBA and the old ABA teams can viably operate.

Moreover, because the ABA was on the brink of oblivion at the time this settlement was concluded in April 1976, threatening to end forever the franchises

into which private investors and municipalities had poured millions of dollars and a decade of work, the jobs, salaries and already earned deferred compensation of many ABA players were about to be lost. The ABA pension plan, protecting both active and former ABA players, was jeopardized as well. Absent a settlement in Robertson, these franchises, jobs, salaries, pension and other benefits would have all been lost, but this settlement saved all of this.

On September 14, 1976, on motion of the NBA, the ABA and the ABA expansion teams, Judge Carter vacated the injunction against merger and consolidation. The predicate for vacatur of the injunction was the modification of the player restraints achieved in the Robertson settlement and the demonstrated inability of the ABA and its members, who by then were limited to the four ABA expansion teams, to operate a professional basketball league for the 1976-1977 basketball season.

In considering the plight of the ABA and its four remaining teams, Judge Carter considered irrebuttable and undisputed evidence of the following:*

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* See affidavits of Robert S. Carlson, sworn to August 10, 1976, James Keeler, sworn to August 10, 1976, Roy L.M. Boe, sworn to August 12, 1976, Willard D. Eason, sworn to August 10, 1976, Angelo Drossos, sworn to August 5, 1976, and Carl Scheer, sworn to August 11, 1976, all in support of the motion to vacate the preliminary injunction. These affidavits are part of the record in this case but are not contained in the Joint Appendix.

(a) Throughout the ABA's nine year history, its members had encountered almost continuous financial difficulties.

(b) Stability and continuity of ownership, which are essential to the successful operation of all professional sports leagues, was a rarity, as teams constantly changed hands and franchises were disbanded, terminated, sold, repurchased and moved.

(c) During the ABA's last season, four of its ten member teams folded and each of the others suffered substantial additional operating losses necessitated by the inability of a seven team league to attract spectator and investor interest.

(d) The ABA, with only four franchises left, no buyers for additional franchises and an inability of its remaining teams to attract the capital necessary to fund even a limited league for the 1976-1977 season, could not continue for a tenth season.

(e) The only way to preserve (i) employment opportunities for the ABA players on the remaining ABA teams, and (ii) the salaries, pension benefits and earned deferred compensation of ABA players, was to permit the four ABA teams to join the NBA.

The ABA expansion teams were able to be absorbed into the NBA, thereby saving not only those franchises but also nearly 50 players' jobs.* Other former ABA players had their ABA contracts guaranteed and secured employment in the NBA through a dispersal draft held in August, 1976. None of this would have been possible without the settlement of the Robertson action approved by the Court below. Further, the Robertson settlement, as a practical matter, permitted the settlement of the ABAPA's separate action against the NBA and the ABA in such a way as to ensure the maintenance of the ABA pension fund to protect retired ABA players while bringing ABA players who signed with NBA teams or whose ABA teams were absorbed into the NBA within the NBA pension plan. Of course, the interests of all basketball fans throughout the country, particularly those who faithfully supported the ABA expansion teams in New York, Indianapolis, Denver and San Antonio, have been protected as well.

All of these benefits will be lost if this settlement is now overturned. Were the settlement refused

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* Not all of the jobs thus protected were held by ABA players. Had the ABA folded entirely, many ABA players would have sought and obtained jobs with NBA teams, thereby depriving many of the Robertson class members of their positions.

approval, class counsel have asserted that the plaintiff class in this action will attack the absorption of ABA teams into the NBA if the NBA were to return to its pre-settlement player allocation system.* If such an attack were to result in the reimposition of the injunction against any merger of consolidation, the absorption of the ABA expansion teams could be undone. The chaos which would result from trying to unscramble leagues, (particularly in light of the number of players traded from NBA to ABA teams and vice-versa during the current season,) is readily apparent. The ABA expansion teams would immediately collapse, as they would lack a league in which to play. Were these teams to fold, numerous NBA and former ABA players would be thrown out of work, the ABA pension plan would fall and the deferred compensation and other benefits enjoyed by former ABA players would be lost. Moreover, those NBA and former ABA players who are playing in the NBA and all future players would have to work under the pre-settlement NBA player allocation system without the safeguards provided for in the Robertson settlement, during years of trials and appeals on the merits of this action.

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* See Brief of Plaintiffs-Appellees p. 3.

The ABA and ABAPA believe that overturning this settlement, with its numerous immediate and substantial benefits to the entire world of professional basketball, on the basis of three objectors' claims, would be unsound in view of all applicable precedents concerning class action settlements and unfair to all parties herein. The ABA, the ABA expansion teams and ABAPA respectfully urge that the settlement be approved, for as Judge Carter found:

> "The proposed settlement constitutes a negotiated compromise which fairly seeks to protect the interests of both the players and the club owners. It should make for an era of peace and stability in professional basketball for many years to come." (JA 1685)

Conclusion

For all the foregoing reasons, as well as for those set forth by the Plaintiffs-Appellees and Defendants-Appellees in their briefs, the judgment of the District Court should be affirmed.

Respectfully submitted,

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NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

U.S. Court of Appeals for the Second Circuit

Robe rtson

Chamberlain

vs

NBA

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Jeffrey Revzin being duly sworn,

deposes and says that he is over the age of 21 years and resides at 1139 E. 10lst street Bklyn,NY

That on the 15th day of February, 1977 at

he served the annexed a mici curiae of ABA brief upon

Weil Gotshal & Manges, 767 Fifth Avenue,NY ,,NY
Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue, NY,NY
Paul Weiss Rifkind Wharton & Garrison, 345 Park Avenue, NY,NY
Rogers Hoge & Hills, 90 Park Ave, NY,NY
Hill Betts & Nash, One world trade center 5215, NY,NY

in this action, by delivering to and leaving with said attorneys two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 15th day of Feb 1977

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Jeffrey Revzin